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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

TONY EUGENE PONCE,

Defendant and Appellant.

F074797

(Super. Ct. No. VCF319337A)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Gary L. Paden, Judge.

Kendall Dawson Wasley, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Jennifer Oleska, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Tony Eugene Ponce was convicted of first degree murder (Pen. Code, §§ 187, subd. (a), 189, subd. (a);¹ count 1), with a gang special circumstance (§ 190.2,

¹ All further statutory references are to the Penal Code, unless otherwise noted.

subd. (a)(22)), and gang and firearm enhancements (§§ 186.22, subd. (b)(1)(C); 12022.53, subds. (d) and (e)(1)). He also was convicted of a criminal street gang conspiracy (§ 182.5; count 2), with an additional firearm enhancement (§ 12022.53, subds. (d) and (e)(1)). He was sentenced to a term of 25 years to life on count 1, with an additional term of 25 years to life for the associated firearm enhancement. The sentence on count 2 was stayed.

On appeal, Ponce challenges the sufficiency of the evidence to support his conviction for first degree murder. We conclude the conviction is supported by substantial evidence.

However, Ponce also contends the case must be remanded for a determination of his fitness for treatment within the juvenile justice system and for the court to consider striking the firearm enhancements. Ponce was 17 years old at the time of the offenses. Pursuant to Welfare and Institutions Code provisions amended by Proposition 57, and our Supreme Court's holding in *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299 (*Lara*), we conditionally reverse the judgment and remand the case to the juvenile court. If the juvenile court determines Ponce is the proper subject of a criminal proceeding, the matter shall be transferred back to the adult court, which shall reinstate the convictions and determine whether to exercise its discretion to strike the firearms enhancements pursuant to Senate Bill 620 and amendments to sections 12022.5 and 12022.53.

FACTUAL AND PROCEDURAL BACKGROUND

On the evening of June 12, 2015, Carlos H.² was fatally shot by Augustine Isarraras in the parking lot of a market and gas station located in the community of Sultana. The shooting and events preceding it were captured on surveillance video without audio.

² To preserve the victim's privacy, we refer to him only by his first name. No disrespect is intended.

The video shows Ponce pumping gas into a white vehicle as another vehicle, driven by Carlos, entered the parking lot. Carlos drove past Ponce to the opposite side of the gas pump and parked parallel to Ponce's vehicle. Ponce watched as the vehicle drove past him. As Carlos exited his vehicle, Ponce knocked on the window of his own car. Isarraras and Ponce's younger brother, Abraham,³ exited the back seat. The victim proceeded toward the market but stopped, looking toward Ponce before eventually beginning to walk in Ponce's direction. As Carlos moved toward the group and Ponce's vehicle, Isarraras moved to the rear of the vehicle, removed a gun from his pocket, and "racked" the gun, chambering a round. Ponce was standing approximately three feet from Isarraras at that point and looking in Isarraras's direction. Meanwhile, Ponce, also near the rear of the vehicle, motioned Isarraras forward, pointing toward Carlos. Carlos backed away, but Ponce, Abraham, and Isarraras converged on him near the entrance to the market. Isarraras consulted with Ponce who nodded slightly, made a gesture toward Carlos, and backed away. Isarraras moved closer to Carlos and shot him in the chest. As Isarraras fired the weapon, Ponce made a hand motion, potentially a gang sign, and the three men then ran back to their car and left the parking lot.

Carlos died as a result of this single gunshot wound to his chest. A .32 caliber shell casing was found in the driveway in front of the market.

I. Ponce's Statements to Police

Ponce made two statements during interviews with Detective Rodney Klassen. The first interview took place the day after the shooting; the second was initiated by Ponce the following day.

Ponce initially denied knowing the shooter's identity and claimed the shooter came to Ponce's house to pick something up and they were merely giving him a ride

³ Because the brothers share the same last name, we refer to Abraham by his first name. No disrespect is intended.

home. Later, Ponce acknowledged having a long history with Isarraras's family, but claimed to have only known Isarraras for about two weeks. He stated that Isarraras went by the moniker "Capper" and was an up-and-coming gang member who wanted to be "jumped in" to the gang. Isarraras is younger than Ponce.

Ponce initially denied being a gang member himself, claiming to be only a Southern or Sureno gang associate. He later admitted he was a jumped-in member of a gang out of Los Angeles that he identified as La Puente Tracy. Ponce reported that he had been jumped by Northerners on several occasions and stated he desired to retaliate because "karma comes around." Ponce stated that his family, including both parents, was involved in gangs. Ponce was initiating his brother Abraham into the gang life but Abraham was not yet a jumped-in gang member. Ponce stated Abraham follows in his footsteps.

In the second interview, Detective Klassen informed Ponce that Isarraras had confessed to being the shooter. Detective Klassen showed Ponce the surveillance video of the incident. Ponce identified himself, Isarraras, and Abraham in the video. Ponce claimed that Carlos was "mad dogging" Ponce as he drove into the gas station. Ponce tapped on the car window to get Abraham's and Isarraras's attention so they would exit the car.

At the point in the video where Carlos stopped walking toward the market and turned to face Ponce, Ponce claimed to have said, "What's up homie," and "Why are you disrespecting me?" to Carlos. Ponce believed Carlos wanted to fight, and Ponce likewise wanted to fight Carlos for challenging or disrespecting him. Carlos then asked if Ponce was a gang banger, to which Ponce replied, "Yes, but my family is here." As Ponce backed away from Carlos, Ponce told Abraham and Isarraras, "Let's jump him."

Ponce claimed he did not see the gun until the group converged on Carlos near the market entrance. Ponce claimed that, at that point, Isarraras asked Ponce whether "he should do it" and Ponce told him, "no, put that away."

In his first interview, Ponce stated that he blacked out prior to Isarraras firing upon Carlos. Detective Klassen told Ponce that was strange because Abraham also reported he “blacked out” at the same point. Ponce responded that they both blacked out and they both have bipolar disorder and schizophrenia. Ponce later admitted his story about blacking out was “BS.”

Ponce knew before the shooting that Isarraras had a gun in his right pocket. At one point, Ponce stated that he was present when the driver of a van gave Isarraras the gun. At another point, Ponce stated that Isarraras approached him in a bragging way, showed him the gun, and stated he would have to return it that same day. After the shooting, Ponce saw Isarraras give the gun, which was wrapped in a blue rag, to the driver of the van that came to Ponce’s residence to pick up Isarraras. Ponce described the gun as a small silver .32 caliber handgun.

II. Eyewitness Testimony

An eyewitness present at the market at the time of the shooting recalled Carlos stating he “did not want any problems.” Thereafter Carlos said, “ ‘Okay,’ like he – like if he didn’t see a way out, and so he said, okay, we’re going to fight.” Then, “they shot him.” She also heard another man ask “[w]hy had he looked at them when they were filling the tank with gas.” She did not see any weapons in the victim’s hands.

III. Gang Evidence

Extensive evidence was presented at trial to establish that Ponce is a member of the Sureno or Southern criminal street gang.⁴ Additionally, Detective Neil Skrinde testified as an expert in gang activities and culture. He explained that getting into a gang requires “putting in work,” either by committing crimes for the benefit of the gang, being jumped in, or having some other “body of work” that shows allegiance to the gang.

⁴ Because the gang allegations are not challenged in this appeal, we do not discuss the evidence of Ponce’s gang membership in detail. We focus instead on the gang evidence relating to intent and the first degree murder conviction.

Criminal activity can also raise a gang member's status within the gang, and more heinous crimes result in higher status.

Northerners and Southerners are gang rivals. Sultana is in Northern gang territory, and the presence of rival gang members in that territory is a sign of disrespect to that gang.

The phrase, "What's up" is used by gang members to challenge a rival to a fight. The phrase, "What do you bang" is used to determine whether someone is a Northern or a Southerner. The phrases, "Why were you looking at me" and "Where are you from?" are similar phrases used as a way of "hitting up" a potential rival.

Gang members want to control territory and be the strongest gang in that territory. Gangs exert control by using respect or fear to control their rivals and other citizens. Gang members may intentionally disrespect a rival gang by going into another's territory or committing a crime against a rival. Gang members must respond to disrespect from a rival or be considered weak.

When gang members are involved in a group assault, they have a duty to "back their homie." A gang member who did not participate with others in a crime or who withdrew from the crime would be perceived as a coward. A gang member would not discourage another gang member from committing a crime.

Gang members carry guns to assert power and authority, as a form of protection, and as a status symbol. A gang member will generally announce to fellow gang members that he is holding a gun so others will know who is armed in the event of an attack or a law enforcement contact.

Detective Skrinde explained that the type of staring exhibited in the surveillance video here would be considered a challenge. Neither the person pumping gas nor the driver of the other vehicle could back down from the confrontation. Once confronted by a rival, the three individuals (Ponce, Abraham, and Isarraras) could not retreat. However, those who were unarmed could step back and permit the armed individual to "take care of

business.” Detective Skrinde described the gestures made by Ponce in the video as “calling [Isarraras] up” or directing him. If a higher-ranking gang member told someone lower in the hierarchy not to shoot, that person would not shoot. However, the higher-ranking gang member could face consequences for appearing weak.

DISCUSSION

I. Sufficiency of the Evidence

Ponce was not the shooter, and he was convicted of first degree murder under a theory of direct aider and abetter liability. Ponce contends there is insufficient evidence he knew of Isarraras’s plan to commit murder or acted with intent to facilitate that offense, as required to support his conviction for first degree murder under this theory. We disagree.

In reviewing the sufficiency of the evidence, “ ‘we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ ” (*People v. Cravens* (2012) 53 Cal.4th 500, 507 (*Cravens*).) “We must presume in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from the evidence.” (*People v. Medina* (2009) 46 Cal.4th 913, 919.) “The conviction shall stand ‘unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].” ’ ” (*Cravens*, 53 Cal.4th at p. 508.) The standard of review is the same in cases in which a conviction is based primarily on circumstantial evidence. (*People v. Clark* (2016) 63 Cal.4th 522, 625.)

First degree murder involves a killing that is willful, deliberate, and premeditated. (§ 189; *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1223-1224.) “Premeditated” means the defendant thought about or considered the act beforehand. (*People v. Pearson* (2013) 56 Cal.4th 393, 443 (*Pearson*); *People v. Perez* (1992) 2 Cal.4th 1117, 1123 (*Perez*).) “Deliberate” means “ ‘formed or arrived at or determined upon as a result of

careful thought and weighing of considerations for and against the proposed course of action.’ ” (*Perez*, at p. 1123.) “ ‘An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse.’ ” (*Pearson*, at p. 443.) Premeditation and deliberation can occur rapidly. (*People v. Cook* (2006) 39 Cal.4th 566, 603-604 (*Cook*); *People v. Thomas* (1945) 25 Cal.2d 880, 900 (*Thomas*).) “The true test is not the duration of time as much as it is the extent of the reflection.” (*Thomas*, at p. 900.)

A conviction for first degree murder under a direct aider and abettor theory of liability requires a showing that the defendant “aided or encouraged the commission of the murder with knowledge of the unlawful purpose of the perpetrator and with the intent or purpose of committing, encouraging, or facilitating its commission.” (*People v. Chiu* (2014) 59 Cal.4th 155, 167 (*Chiu*).) In other words, the aider and abettor “must know and share the murderous intent of the actual perpetrator.” (*People v. McCoy* (2001) 25 Cal.4th 1111, 1118.) “An aider and abettor who knowingly and intentionally assists a confederate to kill someone could be found to have acted willfully, deliberately, and with premeditation, having formed his own culpable intent.” (*Chiu*, at p. 167.) Intent to kill may be inferred from the defendant’s acts and the circumstances of the crime. (*People v. Smith* (2005) 37 Cal.4th 733, 741.)

Here, substantial evidence supports a finding that Ponce knowingly and intentionally aided and abetted Isarraras’s commission of premeditated and deliberate murder. Ponce, a Southern gang member, told police he had been jumped by rival Northern gang members and wished to retaliate. He rode with two younger juveniles, one of whom Ponce knew to be armed, into rival Norteno territory. Both juveniles were being indoctrinated into the gang lifestyle. Ponce visually challenged Carlos then tapped on his own car window to signal Abraham and Isarraras to get out. As Isarraras racked his gun, Ponce motioned Isarraras forward with his left hand and pointed at Carlos with his right. After Ponce and his companions converged on Carlos, Isarraras consulted

briefly with Ponce, and Ponce made a slight nod and gesture toward Carlos before backing away. Isarraras immediately proceeded forward and shot Carlos. The People's expert testified that a higher-ranking gang member would encourage, rather than discourage, a lower-ranking member to shoot a rival, particularly once the gun had been presented. Based on this evidence, a reasonable juror could determine that Ponce shared Isarraras's intent to kill Carlos, a perceived rival.

There is a modicum of evidence to suggest Ponce was unaware of or did not share in Isarraras's intent: Ponce claimed not to have seen Isarraras initially draw his weapon and claimed to discourage the shooting once he became aware of Isarraras's intent. Video evidence, however, shows Ponce looking in Isarraras's direction as the gun is drawn, and gesturing Isarraras toward Carlos both at that moment and, subsequently, when Ponce claims Isarraras asked if he should shoot. It was for the jury to determine from this evidence whether Ponce's claimed efforts to discourage the shooting were credible. In contrast, our duty on appeal is to determine only whether a reasonable trier of fact could find defendant guilty beyond a reasonable doubt, not to determine whether the facts might also support a contrary finding. (*People v. Alexander* (2010) 49 Cal.4th 846, 917.) While the jury could have relied on Ponce's denials to find Ponce not guilty, it did not do so. Substantial evidence supports the jury's finding of guilt.

Ponce also claims the incident was too brief to suggest premeditation or deliberation. As stated, premeditation and deliberation can occur rapidly. (*Cook, supra*, 39 Cal.4th at pp. 603-604; *Thomas, supra*, 25 Cal.2d at p. 900.) The brevity of the event does not negate a finding of premeditation, particularly in light of Ponce's actions. Ponce's decision to travel with an armed associate into rival gang territory and his stated desire to seek retaliation, combined with his conduct as reflected on video surveillance, are sufficient evidence upon which a jury could base a finding of premeditation.

II. Proposition 57

At the time of the offense, Ponce was 17 years old. The district attorney directly filed the complaint in criminal court, which filing was permissible under then-applicable law. (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 549; accord, *Lara, supra*, 4 Cal.5th at p. 305.) Subsequently, however, the voters approved Proposition 57, the Public Safety and Rehabilitation Act of 2016. (*Lara, supra*, at p. 303.) Proposition 57 prohibits the direct filing of juvenile cases in criminal court. (*Ibid.*; Welf. & Inst. Code, § 707, subd. (a)(1).) Now, the district attorney may seek to transfer a case from juvenile court to criminal court, but allegations of criminal conduct against a person under the age of 18 must be initiated in juvenile court. (*Lara*, at p. 303; Welf. & Inst. Code, § 707, subd. (a)(1).) If the district attorney brings a transfer motion, it is for the juvenile court to determine whether the juvenile should be transferred to criminal court. (*Lara*, at p. 303; Welf. & Inst. Code, § 707, subd. (a)(2).)

In *Lara, supra*, 4 Cal.5th 299, which was decided after briefing was completed in this case, the California Supreme Court determined that Proposition 57 applies retroactively “to all juveniles charged directly in adult court whose judgment was not final at the time it was enacted.” (*Lara*, at p. 304.) As such, Proposition 57 applies retroactively to Ponce.

The *Lara* opinion tacitly endorses a remand procedure described by the Fourth District Court of Appeal in *People v. Vela* (2017) 11 Cal.App.5th 68, review granted July 12, 2017, S242298, and cause transferred February 28, 2018 (*Vela*). (*Lara, supra*, 4 Cal.5th at pp. 310, 313 [“we believe remedies like those provided in *Vela* ... are readily understandable, and the courts involved can implement them without undue difficulty”].) Following that procedure, we will conditionally reverse Ponce’s conviction and sentence, and the matter will be remanded for the juvenile court to conduct a juvenile transfer hearing pursuant to Welfare and Institutions Code section 707. (*Lara, supra*, at p. 310.) “ ‘If, after conducting the juvenile transfer hearing, the court determines that it would

have transferred [the defendant] to a court of criminal jurisdiction because he is “not a fit and proper subject to be dealt with under the juvenile court law,” then [his] convictions ... are to be reinstated. ([Welf. & Inst. Code,] § 707.1, subd. (a).) On the other hand, if the juvenile court finds that it would *not* have transferred [him] to a court of criminal jurisdiction, then it shall treat [his] convictions as juvenile adjudications and impose an appropriate “disposition” within its discretion.’ ” (*Lara, supra*, 4 Cal.5th at p. 310, quoting *Vela, supra*, 11 Cal.App.5th at p. 82.)

III. Senate Bill 620

The People concede recent amendments to section 12022.5 and 12022.53 are applicable to Ponce. We agree.

Prior to January 1, 2018, an enhancement under sections 12022.5 and 12022.53 was mandatory and could not be stricken in the interests of justice. (See former §§ 12022.5, subd. (c), 12022.53, subd. (h), added by Stats. 2010, ch. 711, § 5; *People v. Felix* (2003) 108 Cal.App.4th 994, 999.) Senate Bill 620 amended sections 12022.5, subdivision (c) and 12022.53, subdivision (h) to permit the trial court to strike firearm enhancements imposed under those sections. (Stats. 2017, ch. 682, §§ 1-2.) Because Ponce’s conviction is not yet final, Senate Bill 620 applies retroactively to him. (See *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091 [remanding pursuant to amended § 12022.53]; see also *In re Estrada* (1965) 63 Cal.2d 740, 744.)

Accordingly, on remand, should the juvenile court determine Ponce is the proper subject of a criminal proceeding, the matter shall be transferred to the adult court, which shall determine whether to exercise its discretion to strike the firearms enhancements under Senate Bill 620.

DISPOSITION

We conditionally reverse Ponce’s conviction and sentence and remand the matter to the juvenile court for a juvenile transfer hearing, within 90 days of issuance of remittitur, wherein the court will determine Ponce’s fitness for treatment within the

juvenile justice system. (Welf. & Inst. Code, § 707.) If Ponce is found fit for juvenile court treatment, the juvenile court shall deem Ponce's convictions as juvenile adjudications and impose an appropriate juvenile disposition after a dispositional hearing. (Welf. & Inst. Code, §§ 702, 706.)

If Ponce is found unfit for juvenile court treatment, the case will be transferred to criminal court and his convictions reinstated. The court shall then determine whether to exercise its discretion to strike the firearm enhancements under Senate Bill 620. If a different sentence results from that determination, the trial court shall prepare an amended abstract of judgment reflecting the resulting sentence and forward it to the Department of Corrections and Rehabilitation.

SNAUFFER, J.

WE CONCUR:

SMITH, Acting P.J.

DESANTOS, J.